

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HP/1261

BETWEEN:

SIMASIKU SIMUKUKA

AND

**LUSAKA CITY COUNCIL
JANE NAMWAI**



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

***Before the Hon. Mr. Justice Mathew L. Zulu in Open Court this
.....day of2023***

For the Plaintiff: Mr. M. Sinyangwe, Messrs. Willa Mutofwe & Associates

For the 1st Defendant: Mr. A.M. Musoka – In House Counsel

*For the 2nd Defendant: Mr. L. Phiri, Messrs. C. Chonta Advocates
Mr. F. E. Mulenga JNR – Messrs. August Hill & Associates*

JUDGMENT

Cases referred to:

- 1. Rapid Global Freight Limited Vs Benjamin Bwalya, Appeal No. 133/2020.***

- 2. Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima (2006) Z.R 12.**
- 3. Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council (2013) ZR, Vol. 2,178.**
- 4. Trevor Limpic v Rachel Mawere and Others, SCZ Judgment No. 35/2014.**

Legislation referred to:

- 1. Lands Act, Chapter 184 of the Laws of Zambia.**

In a Writ of Summons issued on 30th September, 2020, from the Principal Registry at Lusaka, the Plaintiff claims the following reliefs:

- a. General damages for trespass to land.**
- b. Special damages being the cost of erecting the wall fence since raised down by the Defendant.**
- c. A declaration that the Plaintiff is the true and registered proprietor of Stand No. 15849/1080 and the allocation to the 2nd Defendant by the 1st Defendant is illegal and hence, null and void.**
- d. An Order of interim injunction restraining the Defendants whether by themselves, their agents or any other person claiming to develop the said piece of land under their authority from interfering with the Plaintiff's piece of land until final determination of this matter by the Court.**
- e. Costs of these proceedings.**
- f. Any other relief the court may deem fit.**

Bundle of Documents. At page 5 of his Bundle of Documents, was the Letter of Sale from Oswald Mukonka to the Plaintiff.

Thereafter, the Plaintiff built a box on the said property. Then he began to pay ground rates to the Lusaka City Council. He, however, realised at the time of paying ground rates that the Stand he was paying for was 15849/1080, and not Stand No. 15848/1080 he had purchased from Oswald Mukonka. PW1 approached Kayo Surveyors over the same. The Surveyors admitted the error they made in swapping his plot with Mr. Ng'uni's Stand No. 15849/1080. PW1 realised that all the while he had erroneously been developing Mr. Ng'uni's plot, while Mr. Ng'uni was likewise developing PW1's Stand No. 15848/1080. The Surveyors wrote a letter at pages 8 and 9 to the 1st Defendant informing them of the error that was made by them. PW1 continued paying ground rates as he waited for the response from the 1st Defendant to the letter which was written by the Surveyors over the swapping of the plots.

As he was waiting for the said response, PW1 found some people building a structure on Plot 15849/1080. It was then that he realised that the said property had been repossessed. He and Mr. Ng'uni

approached the 1st Defendant Director of Legal to find out what had transpired. They were, however, chased by the Director Legal. It was his testimony that his property was repossessed by the 1st Defendant without affording him an opportunity to be heard. When shown a notice of revocation of his property No. 15849/1080 appearing at page 7 of the 2nd Defendant's Bundle of Documents, and also in the 1st Defendant's Bundle of Documents, showing that his Plot had been repossessed by the 1st Defendant, PW1 denied that the said notice was served on him.

PW1 explained that before Stand No. 15849/1080 was repossessed from him, he had put up a box which was later destroyed by the 2nd Defendant's relative, Mr. Ng'ambi. He referred the Court to the picture of the said box at page 6 of his Bundle of Documents.

In cross-examination of PW1 by Mr. Phiri, PW1 confirmed that he purchased Stand No. 15848/1080 on 20th October, 2005, and in 2007 he put up on Stand No. 15849/1080 a box. Other than the said box, he did not develop the property further. PW1 admitted that the letter from Kayo Surveyors to the 1st Defendant was written after the 1st Defendant had already repossessed Stand No. 15849/1050. He

further conceded that Kayo Surveyors did not make any recommendations to the Council but merely stated the facts as they were on the ground. He accused the Surveyors of showing him and Mr. Ng'uni wrong plots. PW1 denied that it was Oswell Mukonka who erroneously showed him the wrong plot.

When shown the documents showing that Stand No. 15849/1080 was lawfully offered to the 2nd Defendant by the 1st Defendant, PW1 stated that he was not aware that the 2nd Defendant was offered the said property. He told the Court that Mr. Ng'uni built a house on Stand 15848/1080.

When further cross-examined by Mr. Musoka, Counsel for the 1st Defendant, PW1 conceded that he neither obtained consent to assign, nor pay property transfer tax when he purchased Stand 15848/1080 from Mr. Mukonka. He further conceded that he did not obtain the Council's planning permission to build the box. He said he was not aware whether the box he put up was illegally made. However, he said he was aware that one has to obtain planning permission from the Council to build. PW1 said he was not aware that anything built without the Council's permission was illegal. He confirmed that the

Council did not approve swapping of plots between Mr. Ng'uni and himself. He said he did not have proof that he owned Stand 15849/1080.

Still under cross-examination, PW1 told the Court that he was aware that William Ng'uni, the initial owner of Stand 15849/1080, was informed of the revocation of the offer letter and repossession of the property. He further stated that he was aware that William Ng'uni did not make representation after he was served with the notice of repossession. PW1 said he was, however, not aware that the 1st Defendant placed an advert in a newspaper five months after it repossessed Stand 15849/1080. He said he had no proof that Kayo Surveyors were engaged by the 1st Defendant to deal with the land in question.

In re-examination, PW1 told the Court that he was not told that Stand 15849/1080 was repossessed by the 1st Defendant. He reiterated that he had no proof of ownership of Stand 15849/1080. PW1 further stated that he was told by Kayo Surveyors that they had been engaged by the 1st Defendant to demarcate land on its behalf in Kamwala South.

PW2 was William Ng'uni of 10/12, Kabwata Estate, Lusaka. He testified that he was offered Stand 15849/1080. Since he had no capacity to develop it, he gave the said plot to his brother, Gabriel Ng'uni to develop. His brother later built a house on the said plot where he currently resides. However, after sometime, PW2 was told by his brother that the plot he built the house on was not actually Stand 15849/1080, but Stand 15848/1080. His reaction was that the error was made by Kayo Surveyors at the time they were shown the plots.

When shown a letter at page 2 of the 1st Defendant's Bundle of Documents addressed to him, showing the withdrawal of the offer of Stand 15849/1080, and a receipt at page 6 of the 2nd Defendant's Bundle of Documents showing that notice to revoke the offer was sent to him, PW2 denied receiving the letter in question and the Notice of Revocation of his offer. He said he only came to know about the revocation from the Plaintiff. After discovering the mix-up in the plots, PW2 and the Plaintiff reported the said error to Kayo Surveyors who went on the ground to verify. Kayo Surveyors admitted their error and PW1 and PW2 decided to exchange the plots.

In cross-examination by Mr. Phiri, PW2 reiterated that after the plot was offered to him, the Council directed him to the Surveyors to show him the plot, which the Surveyors did. He conceded that he did not personally go to Kayo Surveyors after the Plaintiff told him that there was a swap. That the information he had of approaching Kayo Surveyors was given to him by his brother and the Plaintiff. PW2 explained that he did not approach the 1st Defendant after the swap was discovered to verify the error. When referred to the address on his offer letter, PW2 admitted that it was him who had given the said address to the Council. He said the said address was for NPF where he used to work.

When further cross-examined by Mr. Musoka, PW2 told the Court that when he stopped working for NPF, he did not inform the Council of the change in address. He conceded that Kayo Surveyors in their letter to the Council did not acknowledge that it was their mistake that there was a swap of plots between the Plaintiff and himself. Further, that Kayo Surveyors did not suggest anything to the Council on the way forward. He maintained that the Council directed them to

Kayo Surveyors to show them the plots. PW2 said it was him who showed his brother the plot after Kayo Surveyors had shown him.

In re-examination, PW2 stated that the Notice of revocation was sent to a wrong address, his former working place, because at that time he had already stopped working. He reiterated that he did not notify the Council of the change in address after he retired. He said he had no proof that Kayo Surveyors were engaged by the Council to show people the location of their plots.

At this stage Mr. Sinyangwe, Counsel for the Plaintiff, asked for an adjournment to summon Kayo Surveyors to Court to clarify on the issues arising from cross-examination of PW1 and PW2. With no objection from the Defendant, the matter was adjourned. However, Kayo Surveyors were not brought to Court to testify. Consequently, the Plaintiff closed his case.

After several applications and adjournments, on 1st March, 2022, trial of the matter continued with the 2nd Defendant, Jane Namwai of 33606/10/80, Kamwala South, testifying as DW1. Her testimony was that, in 2009, while living in Kamwala South, she noticed an undeveloped piece of land. This land had remained undeveloped for

a long time. She made enquiries of the said land she came to know as Stand No. 15849/1080, Kamwala South. In 2010, when she saw that the piece of land was still undeveloped, DW1 made an application, appearing at page 1 of her Bundle of Documents, to the 1st Defendant for the same land. In 2013, DW1 received a response from the 1st Defendant to the effect that the land in question was not available for allocation, because the Council was yet to repossess it from the previous owner and advertise it.

Later, DW1 received from the 1st Defendant a letter to William Ng'uni withdrawing of offer for Plot 15849/1080 Kamwala South for failing to develop the plot within 18 months of being offered. She referred to the said letter at page 5 of her Bundle of Documents. She sent the letter in question by registered mail to William Ng'uni and she was issued a receipt at page 6 of her Bundle of Documents. The 1st Defendant further availed DW1 an advert it ran in the Newspapers notifying the owners of undeveloped pieces of land in Bauleni and Kamwala South of the Council's intention to revoke their offers.

Thereafter, the 1st Defendant in its letter dated 28th November, 2013, appearing at page 8 of the 2nd Defendant's Bundle of Documents,

was not aware at the time of applying for the plot that the said plot was a subject of a swap.

In re-examination, DW1 stated that, to her, the letter at page 5 of her Bundle of Documents was proof that the 1st Defendant had withdrawn William Ng'uni's offer of Stand 15849/1080, Kamwala South.

I have carefully considered the evidence in this matter. The case for the Plaintiff is that he purchased Stand No. 15848/1080, Kamwala South, from Oswell Mukonka. He began to construct a foundation on a plot he believed was his plot 15848/1080. Unknown to the Plaintiff, he was in fact building on Stand No. 15849/1080, belonging to William Ng'uni. Later, the Plaintiff realised that the said Ng'uni had actually been developing Stand No. 15848/1080 which belonged him. That was how the two approached Kayo Surveyors, the people who were allegedly contracted by the 1st Defendant to show them the location of their respective plots. Kayo Surveyors acknowledged their mistake that they had unintentionally swapped their plots at the time of showing them. To formalise the swap, Kayo Surveyors wrote a letter to the 1st Defendant notifying them of the swap.

Later, the Plaintiff was surprised to learn that Stand 15849/1080 was a subject of a re-entry and repossession by the 1st Defendant for breaching the condition of the offer requiring William Ng'uni, the offeree, to develop the said property within 18 months of being offered the said land. That consequently, Stand No. 15849/1080 was offered to the 2nd Defendant. The Plaintiff called William Ng'uni as his witness. He testified as PW2. PW2 confirmed the swap of plots which was inadvertently done by Kayo Surveyors at the time of being shown the plots. He denied receiving a notice of intention to re-enter Stand 15849/1080 from the 1st Defendant. He, however, admitted that the address on the withdrawal of offer of Stand 15849/1080 at page 3 of the 1st Defendant's Bundle of Documents was his last known address.

On the other hand, the 2nd Defendant told the Court that Stand No. 15849/1080, Kamwala South, was properly allocated to him by the 1st Defendant after she applied for it. She contended that the same had remained undeveloped for quite some time, thereby prompting the 1st Defendant to re-enter upon the property and repossessed it. That the said property was only offered to her after the 1st Defendant

withdrew William Ng'uni's offer. The 2nd Defendant's evidence on how she acquired the disputed piece of land has the support of the 1st Defendant.

It is not in dispute that Stand No. 15849/1080 was allocated to William Ng'uni by the 1st Defendant, while the Plaintiff purchased Stand No. 15848/1080 from Oswell Mukonka. It is further not in dispute that William Ng'uni's brother, Gabriel, who was given the said plot by William Ng'uni, erroneously constructed his house on the Plaintiff's Stand 15848/1080. Likewise, the Plaintiff began to erect a foundation on Stand 15849/1080, albeit, without planning permission from the 1st Defendant. It is common cause that as things stand now, Gabriel Ng'uni lives in the house he built on the Plaintiff's plot. It is on that basis that the Plaintiff is claiming Stand No. 15849/1080 which was originally offered to William Ng'uni as his. There is no dispute that the 1st Defendant, upon withdrawing William Ng'uni's offer, offered the said property to the 2nd Defendant, who has since built on the property a boundary wall fence and installed a gate. Although the Defendants seem to suggest that the Plaintiff has no interest in Stand 15849/1080, because the property he purchased

from Oswell Mukonka was Stand 15848/1080, given the circumstances of the case, I am satisfied that he has sufficient interest in Stand 15849/1080. The real issue, as I see it in this case, is whether or not the 1st Defendant properly re-entered upon Stand 15849/1080 and repossessed it for breaching the conditions of the offer, namely failure to develop the plot within 18 months of the offer. The evidence in support of the re-entry is that, after the 1st Defendant was approached by the 2nd Defendant for a possible allocation to her of a dormant piece of land she had discovered in Kamwala South, the 1st Defendant indicated that before allocation, it needed to comply with the law on re-entry. After sometime, the 1st Defendant gave the 2nd Defendant a letter to post to William Ng'uni revoking his offer letter.

The procedure of causing a certificate of re-entry to be entered in the register is contained in Section 13 of the Lands Act, Chapter 184 of the Lands of Zambia which provides as follows:

“13. (1) Where a lessee breaches a term or a condition of a covenant under this Act the President shall give the lessee three months’ notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held

by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.

(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

The rationale of Section 13, above, was aptly put by the Court of Appeal in the case of **Rapid Global Freight Limited Vs Benjamin Bwalya**¹, in its Judgment delivered on 16th August, 2022, as follows:

"The kernel of Section 13 of The Lands Act is to afford the lessee to either make representations and/or amends for the alleged breach. It is therefore mandatory that the lessee is served with the notice of the intention to cause a Certificate of re-entry to be entered. This means that apart from ensuring that the notice is served on the lessee, there should be proof of such service. Further, that only after the expiration of the three months'

notice period should the President consider whether there has been any representation. If there are any representations, he should consider whether he is satisfied that the breach was not intentional or beyond the control of the lessee.”
(Emphasis by underlining supplied).

Regarding the form of service of the notice, the Court of Appeal went on to state that it must be by registered post to the affected person’s usual address, when it stated:

“... As regards service of the notice, we accept Mr. Chalenga’s submission that although this is not provided for in the main body of the provisions of the Lands Act, it has come to be accepted that judicial notice should be taken to the effect that service of notices is in line with Rule 27 of the Lands Tribunal Rules of the Lands Act supra. Notice should therefore be by registered post to the lessee’s usual address for service.”

Further, the Supreme Court in the case of **Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima²**, held as follows:

“1. The mode of service of the notice of intention to a cause a certificate of re-entry to be entered in the register for a breach of the covenant in the

Lusaka City Council case, I find that William Ng'uni did not breach the fundamental term of the offer of not developing the plot within 18 months, since such condition was not provided in his letter of offer.

The second question to resolve is whether or not William Ng'uni was served with a notice of the 1st Defendant's intention to cause a certificate of re-entry to be entered in the register in respect of Stand 15849/1080. As already alluded to above, the correct mode of effecting service is by registered mail to the person's last known address. In this case, it is not in dispute that a letter revoking William Ng'uni's offer was sent to him by registered mail to his last known address. This was proper service as required by law. However, the issue does not end there, because the nature of the letter whose service was properly made relates to the revocation of William Ng'uni's offer. The law requires that before re-entry on the property and eventual revocation of the offer, the 1st Defendant ought to serve upon the affected person notice of its intention to re-enter the property for breach of the fundamental condition. As was held in the authorities I have cited above, the purpose for such notice is to afford the affected person an opportunity to make meaningful

representation why his property should not be re-entered. In *casu*, the notice which the 1st Defendant served on William Ng'uni was for the revocation of his offer. I find that no notice of the 1st Defendant's intention to re-enter the property was ever served on William Ng'uni to give him an opportunity to make representations why he did not develop the property within the purported 18 months' period. This was clearly in contravention of Section 13 (1) of the Lands Act. I hold that the alleged re-entry and repossession was, therefore, illegal and invalid. In the case of **Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council**, *supra*, the Supreme Court held thus:

"If repossession is effected in circumstances where the lessee is not given an opportunity to explain such repossession, the repossession could not be said to be valid."

Having found the repossession illegal and invalid, the 1st Defendant's offer of Stand No. 15849/1080 to the 2nd Defendant, without following the due process of the law, was in the circumstances unjustified. Accordingly, I order the 1st Defendant to cancel the 2nd Defendant's offer forthwith. Considering that William Ng'uni and the Plaintiff inadvertently swapped their plots, not due to any fault of

their own, I order and direct the 1st Defendant to legally effect the swap so that the Plaintiff becomes the legal owner of Stand No. 15849/1080 and William Ng'uni the owner of Stand No. 15848/1080 where his brother has built a house. As for the improvements made by the 2nd Defendant on the property, namely a wall fence and a gate, the Supreme Court in the case of **Trevor Limpic v Rachel Mawere and Others**⁴, guided as follows:

“But before we leave this matter, we wish to say that from the pictures which were shown in the Motion that was made in this Appeal; the Appellant has expended a lot of money on the property in question. To allow the Respondents to take the property in question with the massive improvements made by the Appellant would be unjust enrichment of the Respondents. Equity will not allow that. We, therefore, order that the improvements be assessed by the Deputy Registrar and the Appellant be paid by the Respondents the worth of the improvements.”

Likewise, in this matter, I find that it would be unjust enrichment for the Plaintiff to take Stand No. 15849/1080 with the improvements made by the 2nd Defendant to the said property. Accordingly, I refer the matter to the Learned Registrar for assessment of the said

improvements. Costs shall be for the Plaintiff against the Defendants to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 29th day of May, 2023

A handwritten signature in black ink, consisting of a stylized 'M' and 'Z' intertwined, positioned above a horizontal line.

Mathew L. Zulu
HIGH COURT JUDGE